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Indiana State Bar Association

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PRESIDENT'S ANNUAL ADDRESS

CHARLES A. LOWE*

Custom decrees that the President of the Association shall prepare and read at the Annual Meeting of the Association the President's Annual Address. In conformity with such custom, I am presenting this paper prayerfully with the hope that it will answer all of the requirements of the occasion. The facts presented in this paper had their origin in a number of speaking engagements which I was called upon to fill as President of your Association. At practically every one of them I was confronted with a situation which determined my subsequent course of action.

That situation, at least as it was presented to me, was a well-defined idea among the lawyers whom I met upon those occasions that the business of the lawyer was slowly but surely slipping from the hands of the legal profession and passing into the hands of boards, commissions and other administrative agencies where a large portion of it was disposed of by persons with little or no legal training. They wanted to know what we, as the organized portion of the profession, were doing or going to do about it.

In the discussion of such matters, one can not ignore the underlying philosophy behind the rise of the administrative process. How much better, say those who have sponsored such boards, to have matters regulated for the business man in advance than to allow him to cut out and choose his own line of conduct and then be subject to an action if such con-

* President of the Indiana State Bar Association, 1946-1947. Address delivered at the Annual Meeting at Evansville on September 5, 1947.

duct does not happen to square with the law. Better to regulate in advance, than to litigate about past transactions. Now the theory is beautiful. As a theory only, it is unanswerable. In practice it does not work so beautifully. Back during the days of OPA, I was closing an estate which happened to have on hand several thousand bales of hay. The question of the sale price arose. I called the OPA office for advice as to the amount for which the hay could be sold per ton. Here was the administrative process in full action. We would get the approved price and act upon it. But it did not work out so simply. I was shunted from one bureaucrat to another until three were on the line listening or talking to me. I explained the situation fully, and then I got the advice or decision of the board. I would have to sell upon my own authority and take the risk of being wrong. The administrative process completely flunked out upon being put to the test. Nevertheless, the process continues. Lawyers blame each other and the courts but the sapping of the lawyer's business goes on.

The legislature gives to some board, composed largely or partially at least of laymen, the power to find facts and apply the law to them—in other words to decide legal causes affecting a large portion of our citizens—and that board is told that they need pay no attention to the rules of evidence. Yet the same legislature has not enough confidence in the judges of our courts to give to them a fractional part of the freedom of action which it gives to some board or commission.

The general impression seems to prevail that it is delay in the courts that gives rise to the demand for speedier action, and results in the creation of boards and commissions. If it is in any degree the fault of the courts and lawyers, then we should determine where the fault lies and endeavor to correct it. Of course, cases in court should be put at issue speedily and disposed of promptly, but there is another viewpoint which should not be lost sight of. The law must develop and be developed as a science—as a system. It is important that such system develop upon safe, sure and sound principles.

Feeling that the organized Bar of the State had some obligation, at least, to find out what the thought of the lawyers and judges of Indiana was upon the subject, I determined to find out, and for that purpose, I prepared and sent out at

my own personal expense a questionnaire soliciting answers to questions.

Definite questions were propounded with the idea of getting answers which could be tabulated, and yet would give a fairly complete picture of what the Bar was thinking upon the subject of judicial procedure in the courts of this State. Approximately four hundred were mailed out. About one hundred were returned. Only one-fourth of those who received the questionnaire were interested enough to fill it out and return it. An effort was made to apportion them over the State so as to give a fair cross-section of opinion, and no attempt was made to confine the inquiry to members of this Association.

I was totally unprepared for the reaction which resulted. In fact, it was not a reaction, it was almost an explosion. I received letters criticizing the questions, and the propriety of sending the questionnaire out. It was rather indelicately suggested that I was seeking to upset the entire method of practice in Indiana. One member of the Bar wrote me to suggest the inclusion in my next questionnaire of the following question: "What is your opinion of that damn nuisance known as the professional reformer?" Others expressed fear that my effort was the beginning of some new crusade for a reformed procedure which would require them to begin their education all over again in that field. This was a frequently voiced fear.

Many excellent commendations were also received. All told, I am proud of the reaction of the Bar to my endeavor. I think they approached the matter with the general idea of helpfulness, and gave their answers with candor and frankness.

Now as to the questions themselves: *Do you favor the present form of answer required?*¹

Not all of them who returned the questionnaire answered this particular inquiry; but of those who did, the great majority favored retention of the present form of answer. The vote was 77% in favor, while only 23% favored a return to the general denial.

Several useful and valuable suggestions were made. One

1. Rules of the Indiana Supreme Court (1946 Revision), Rule 1-3.

urged a strict enforcement of the rule to the end that as many facts as possible be eliminated from controversy by admission. The trial court would then, in giving its instructions, be able to state that such admitted facts might be considered as uncontroverted, and the trial thereby confined to matters really in dispute. The Bar seems to favor the new form of pleading but several added a word of caution. It should not be made the basis or excuse for a long argumentative denial, and it should not become a method or means of confusing the issues by an intermixture of denials with allegations of affirmative matter.

*Do You Favor Pre-Trial Procedure?*²

Should it be made mandatory?
Should it be left to the discretion of the trial court?
Should it be mandatory upon demand of any party?
Have you used it to advantage?
Does your court make use of it?

Upon the main question 72% favored the pre-trial method while 28% opposed it entirely. The vote upon the question of making it mandatory was adverse, as 82% opposed it. Upon the question of leaving it to the discretion of the trial court, 56% favored it and 44% opposed. Upon the question of making it mandatory upon demand of any party, 66% favored it. Less than 50% said they had used pre-trial procedure to advantage and only about the same percentage reported that the judges in their circuits made use of it.

A number of statements were returned in which the value of pre-trial procedure was decried while at the same time admitting that it works in the federal courts. This they ascribe to two causes: (1) the lawyers are fearful of admitting too much, (2) the judge is not insistent upon a determination of the facts which are not in dispute. Several commented favorably upon the method used by Judge Robert C. Baltzell in the District Court for the Southern Division of Indiana where the practice prevails of having a written stipulation prepared by each party. This usually results in a substantial reduction of the facts necessary to be proved upon the trial.

One statement was to the effect that pre-trial procedure

2. Rules of the Indiana Supreme Court (1946 Revision), Rule 1-4.

worked rather well in his county at first. Then, rather ironically, he gives the reasons for the breaking down of the system: The plaintiff's lawyers looked upon it as a method for bringing the defendant's lawyer before the judge, who would force a speedy settlement. The defendant's lawyer looked upon it as a method of squeezing something from him to help the plaintiff make his case. Thus fear stepped in, the judge did nothing, and the system languished and died.

One prominent lawyer, who I know handles many litigated cases, places the blame upon a failure to adopt a rational trial theory, with courage to carry it through when once adopted. This would result in a frank admission of all facts not necessary to support the adopted theory.

Another interesting suggestion comes from one of our judges. He suggests that pleadings be prepared and filed at such pre-trial hearings. Thus the defendant's attorney should be required to present all motions or other objections to the complaint at the pre-trial hearings. When such objections were settled or decided by the court, the answer and reply could be filed, and the cause thus put at issue for trial. This involves a proceeding within a proceeding and would probably be cumbersome in practice. Pre-trial procedure can be made to serve a useful purpose and thus far the method of requiring each side to state in writing what it is willing to admit seems to offer a means which will save time and simplify trials.

Instructions to Juries

The universal complaint under this topic was "too many, too long, too technical." All seemed to agree that the court should state the issues to the jury in concise form and should not read long and involved complaints, answers and replies. The giving of oral instructions lost by a large vote—89% opposed oral instructions.

Many suggested a limit upon requests by a party. Some even went so far as to advocate that the court prepare all instructions and that parties be merely permitted to request instructions upon points of law.

The question as to standardized instructions opened up a lively debate. Many, it seems, are more or less familiar with the method used in California. Just why "stock" instructions could not be approved in advance by our Supreme Court for

the use of judges is difficult to see. For example, instructions treating with negligence, contributory negligence, proximate cause, credibility of witnesses, province of court and jury, reasonable doubt, presumption of innocence, and many other matters might well be covered by approved instructions. Of course, the trial judge would not be compelled to use them, but they would save time, possibly avoid error, and secure uniformity of practice. The idea may be worth a try. At least it opens up a field to study what is being done in other states.

Only 20 lawyers favor the judge commenting upon the evidence so far as it permits expressing an opinion upon evidence or credibility of witnesses. Many lawyers, however, think our judges are too timid in stating to the jury that certain facts are admitted or at least not disputed. This would narrow the dispute to its actual status, shorten instructions and shorten trials.

*Do You Approve of the Present Method of Objecting to Instructions?*³

This question developed a lively difference of opinion. Almost 75% of the answers favored retention of the present system, and yet many appended their comments evincing a partial dissatisfaction. The element of time seems to be the deciding factor. A few complain that some judges refuse time to dictate objections. Others claim that they cannot within the short time allowed determine what is objectionable and what is not. Of course, there is no immediate remedy we can suggest for such lack of perception, and yet one must consider that instructions copied in the language of opinions, can be highly confusing to lawyers as well as to jurymen.

All told, however, the present method seems to meet with favor, provided that the judge grants sufficient time to make objections.

Change of Venue

The change of venue question brought forth the greatest controversy of all. Some look upon the change of judge as mere perjury, spite and ill-will against the judge. Others

3. Rules of the Indiana Supreme Court (1946 Revision), Rule 1-7.

consider it as a necessary adjunct to the securing of a fair trial. Ninety percent favor retention of the mandatory change of judge. Many suggest that it be done by written request rather than by affidavit.

Several kindred matters are here touched upon. Serious objection is made to that portion of the statute which requires that the person whom the parties agree upon shall be named as "special judge."⁴ Lawyers from several localities reported an abuse of this provision by cross-appointments—a sort of Greek affair—"You agree on me today and I'll agree on you tomorrow." Others took a fling at the "Judge pro tem" which was not covered in the questionnaire.

One is surprised by the expressions of opinion in favor of some administrative power in the Supreme Court to assign judges from other parts of the state to sit in change of venue cases and to assist in the cleaning up of dockets. The number of such comments, and the side communications coming to me as a result of the questionnaire, lead me to believe that more real dissatisfaction exists with reference to the selection of special judges than to the change of judge provision itself. As to change of venue from the county, almost 90% agree that a change might well be denied in cases of purely equitable cognizance and in divorce.

The warmest expressions I received, some even verging on profanity, came to me in protest of the use of the change of venue statutes for delay. Some suggest a time limit after filing the suit, some that the change should be taken in open court, others that it should be taken within a fixed time after assignment for trial. That some method should be devised to prevent its use for mere delay is the opinion of many. That it should be retained in some form is practically the opinion of all.

Reserving Right to Rule Upon a Motion for a Directed Verdict

Nearly 70% of the answers favored this procedure with the limitation added that the right should exist only as to the motion made at the conclusion of all the evidence.

Simplification of Issues

This, in general terms, met with quite general approval.

4. Rules of the Indiana Supreme Court (1946 Revision), Rule 1-12.

I think I can best summarize the result as follows:

1. The form of the summons should be amended to read that the defendant is required to "answer" within a fixed time. The present form is too easily confused with a subpoena when read by an officer.
2. The requirement that, where the defendant appears, a rule to plead must be entered against him before he can be defaulted should be abolished.
3. The demurrer should be abolished and the objection raised by a motion to dismiss. In fact the majority opinion inclines to the view that all objections prior to answer should be taken by one motion addressed to the complaint. Sixty-eight percent of the answers favored abolishing the demurrer and favored questioning the sufficiency of the complaint by answer in which all objections of the complaint are set up at once.
4. The reply should be retained.

These I think fairly summarize the thought upon this branch of the inquiry.

Summary Judgments⁵

One of the surprises I received was the attitude with reference to summary judgments. Every lawyer, of course, has had cases of account, upon promissory notes, foreclosure of mortgage and other forms of action to which no substantial defense existed and yet where an answer of general denial was filed, changes of venue taken, all for the sole purpose of delay. Of course, a strict adherence to the requirements of Rule 1-3 would prevent this in a large measure. Yet 63% of the answers favored a summary judgment law in Indiana.

Such laws already exist in several states and provide in general that after the defendant has answered, the plaintiff may then file an affidavit that no real defense exists. The defendant then must satisfy the court that a controverted question of fact exists which he is entitled to have tried in the regular manner, otherwise judgment is at once entered against him.

Rule 56 of the Federal Rules of Procedure provides for a summary judgment in the federal courts. This Rule is broader than that adopted in most of the states where the

5. Clark "Code Pleading" 556-567 (2d ed. 1947).

judicial function is limited to the determination of the question whether a genuine issue of fact is involved. Under the Federal Rule, the court "shall if practicable ascertain what material facts exist without substantial controversy, and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just."

Summary judgment procedure has been used in England since 1855, and in New York since 1921. New Jersey, Connecticut, Wisconsin, Michigan, Illinois, California, and some other states also have some form of summary judgment procedure.

I make no recommendation but merely call your attention to a field of law which has been wholly undeveloped in this state.

Requiring Trial Court to State That It Has Weighed the Evidence

Unquestionably, the trial court, in ruling upon a motion for a new trial, must, where the sufficiency of the evidence is attacked, weigh the evidence as if no verdict of the jury had been returned. The difficulty arises from the fact that trial judges apply the rule which is adopted by courts of appeal that they will not weigh the evidence but will affirm if there is some evidence upon every material issue. Fifty-five percent of those who replied thought the trial judge should not be required to state in ruling upon the motion that he had weighed the evidence. Many thought it would be ineffective and of no benefit.

Discovery Provisions

Sixty-one percent of the replies favored a liberalization of the discovery provisions of the code, but all who commented were careful to provide against a rule which would require divulging of statements and evidence which have been taken as a preparation for trial.

Appellate Procedure

I shall briefly state the views upon some questions under this topic and then come to the one which drew most attention.

The narrative bill of exceptions does not win approval nor does the proposal to file in the trial court the specific points to be presented on appeal. The oral argument seems to carry little weight with the profession. Sixty-eight percent of those who answered opposed, placing more emphasis upon oral argument and less upon written briefs. A pre-briefing conference was not approved by a rather close vote.

The one provision which seemed to overshadow every other thing in connection with appellate procedure is the requirement of a "condensed recital of the evidence" in appellant's brief. Many lawyers think that this feature of the brief might well be omitted, and one attorney of wide appellate experience called my attention to the fact that some briefs contain 300-400 and even 500 printed pages, most of which is a needless recital of evidence. The cost of court reporter's fees, clerk's fees, and printing briefs is so great in many cases that lawyers are discouraged from taking appeals, and do not in many cases get as much for the preparation of the brief and the legal research involved therein as the fellow who merely prints it.

These suggestions seem to summarize the situation with reference to appellate procedure:

- (a) The motion for a new trial should be abolished.
- (b) The assignment of errors should be abolished and the party appealing should file his objections in the court below pointing out where error was committed by the trial court.
- (c) The appellant should procure a transcript of so much of the evidence as he thinks will present his case on appeal, file it in the clerk's office and serve a copy on his opponent, who should within a fixed time supplement the transcript by such omitted parts as he thinks should be incorporated in the record. The trial judge should settle the bill of exceptions and certify that it contains all of the evidence necessary to present the questions involved in the appeal.
- (d) The condensed recital of the evidence should be eliminated.
- (e) The brief should be a clear and concise presentation

of the alleged errors committed by the trial court with appropriate references to the typewritten record.

This would substantially parallel the federal procedure. The proposal merits your consideration.

I think the judges of our courts should know that numerous letters have come to me, wholly aside from the answers to the questionnaire, urging an increase in the salaries of judges of our lower courts. Increased salaries, an adequate pension system for judges based upon length of service, and supervision of local courts by the Supreme Court by assignment of judges of other courts to try change of venue cases and to assist in cleaning up crowded court dockets—all these were suggested and should be given study.

I cannot close this paper without paying a tribute to the excellent co-operation given me by those who took the pains and trouble to answer the questionnaire. They indicated an intelligent and progressive approach to the subject.

I myself am not a "reformer" either of the "damned" or "undamned" variety, and yet I am not "the last to lay the old aside." I have no criticism to offer of the present methods of procedure and I think that Indiana lawyers and Indiana judges do just as good a job of administering justice as is done in any state of the Union.

If by capable and patient study and consideration, we can improve the practice in our courts and thereby hand down to future generations a more enlightened, surer and speedier administration of justice, we shall have served our own generation well. If I have, in any way, assisted in that endeavor, I am satisfied with my effort.